IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8728 OF 2005

M/s.Sargam Industries .. Petitioner

Versus

Zenith Metaplast Pvt.Ltd. .. Respondent

Mr.M.B.Mehere for petitioner

Mr.S.S.Kulkarni for respondent.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 14th February 2006.

P.C.

. Heard Mr.Mehere for petitioner and Mr.Kulkarni for respondent.

2. By this petition under Article 227 of the Constitution of India, petitioner challenges an order dated 20th October 2005 passed by Civil Judge, Senior Division, Nashik (page 82 Exh.F) whereby the learned Civil Judge has directed that defendant Nos. 1 to 3 in Special Civil Suit No.15 of 2002 will have to cross examine the witnesses of Madan Sales Corporation (Plaintiff) in Special Civil Suit No.91 of 2005 before cross examination of defendants in both suits. This direction is issued because in the opinion of the learned Judge both suits are being tried together.

3. Grievance of Mr.Mehere is that as far as petitioner is concerned, it is party to Special Civil Suit No.15 of 2002 pending in the Court of Civil Judge, Senior Division, Nashik. It is party defendant No.1. Respondent to this petition is the plaintiff in Special Civil Suit No.15 of 2002. One M/s.Madan Sales Corporation

is party defendant No.4.

4. Respondent plaintiff in this suit claims a money decree in the sum of Rs.16,75,918.44.

5. Mr.Mehere invites my attention to the plaint in Special Civil Suit No.91 of 2005 filed by M/s.Madan Sales Corporation which is defendant No.4 in Special Civil Suit No.15 of 2002. In Special Civil Suit No.91 of 2005, the respondent to this petition is defendant. That is also recovery suit and the claim therein is Rs.13,52,871.22.

6. The Special Civil Suit No.91 of 2005 has been instituted pursuant to the order passed by this Court in a Company Petition which was filed against respondent herein by M/s.Madan Sales Corporation. While agreeing to establish its claim by filing a civil suit, it appears that M/s.Madan Sales Corporation and respondent to

this petition further agreed that suit to be filed by Madan Sales Corporation would be heard and decided along with Suit No.15 of 2002.

7. It is on the basis of the aforesaid developments and further, according to Mr.Kulkarni for respondents, an arrangement between parties that the present respondent moved an application in both suits for fixing order of cross examination. It is submitted in the application which is filed on behalf of defendant in Suit No.91 of 2005 that present petitioner and M/s.Madan Sales Corporation are hand in glove with each other. There is tri-partite agreement between them and they are supporting each other. Since both suits are being tried together and M/s.Madan Sales Corporation have filed its affidavit in evidence, before the present respondent defendant proceeds to cross-examine the witnesses, petitioner who is party defendant No.1 in Suit No.15 of 2002 must cross examine the

witnesses of M/s.Madan Sales Corporation.

8. It is the case of respondent that if the petitioner cross examines the witnesses in Suit No.15 of 2002 after the respondent conducts cross examination, it will wipe out the effect of the cross examination by respondent herein and thereby his interest would be prejudiced seriously.

9. Such application which was made on 20th October 2005 was naturally opposed by the present petitioner. Firstly, it was pointed out that it is legally untenable. Secondly, all allegations of tri-partite agreement were denied. It was pointed out that transactions between petitioner and respondent which are subject matter of a suit, to which they are party, are independent and merely because the suits are being tried together, they cannot be compelled to cross examine witnesses in the above manner.

10. It is this application which is allowed by the impugned order and the present petitioner invokes this Court's jurisdiction under Article 227 of the Constitution of India to challenge the same.

11. Mr.Kulkarni, appearing for respondent, has filed an affidavit in reply. He has also brought to my notice the fact that parties have proceeded on the lines suggested by the trial court in the impugned order and, therefore, the issue raised in this petition is wholly academic.

12. Normally, this Court is reluctant to interfere with interlocutory orders of the present nature but in this case, patent illegality has been committed by the trial court in determining the order of examination of witnesses. The trial Court is compelling petitioner to cross examine witnesses who are

being examined in both suits, admittedly. To one of the suit viz., Suit No.91 of 2005, present petitioner is not a party. Therefore, even if parties to that suit depose as far as their case is concerned, the present petitioner who is party defendant in a distinct suit cannot be compelled to proceed and cross examine these witnesses insofar as the case set up in Civil Suit No.15 of 2002. In other words, by consolidation of suits, it does not mean that the order of examination of witnesses determined by the court necessarily follows and as directed in the present case. There is substance in the grievance of the petitioner that it is party defendant in Suit No.15 of 2002. M/s.Madan Sales Corporation and present respondent are parties to Special Civil Suit No.15 of 2002 as well as to Special Civil Suit No.91 of 2005. However, by that it does not mean that petitioner who is not a party in the other suit must be compelled to cross examine the witnesses in the manner suggested by respondent

plaintiff.

13. It is the case of the respondent plaintiff in Special Civil Suit No.15 of 2002 that it is entitled to a decree against both petitioner herein and M/s.Madan Sales Corporation. M/s.Madan Sales Corporation in their turn as far as their suit is concerned are claiming a decree against respondent herein. Once the petitioner is not party in both suits, then naturally order of examination of witnesses determined by the trial court would prejudice the petitioner. Petitioner has denied tri-partite agreement. The pleas set up by petitioner in a suit to which it is a party do not appear to be common. Atleast, the order does not reflect this position. The trial court has been unable to point out any provision which would empower the Court to determine such order of examination of witnesses. Even if the Court were to resort to a provision which enables consolidation of suits

that is always subject to the power of court to order separate trials. The inherent powers do not empower the Court in these facts and circumstances to pass the impugned order. Moreover, parties are not consenting to the order of examination of witnesses determined by the Court. Even if the Court directs consolidation it does not mean that the Court can determine the order of examination of witnesses, unless it is agreed that common question of fact and law would arise and even if one party is not joined in the other suit, that would not make any difference.

14. Admittedly, in the present case there is no agreement between petitioner and defendant. Order of examination of witnesses is not determined by consent. In such circumstances, the trial court would have been well advised not to determine the order of witnesses as has been done in the instant case. The order under challenge is, therefore, patently unsustainable.

It is vitiated by an error apparent on the face of the record and it is accordingly set aside.

15. In the light of the directions issued viz., setting aside of the order dated 22nd October 2005, it is not necessary for me to go into other aspects of the matter. The trial of both suits shall now proceed in accodance with law and it will be open for the court below to decide as to whether the respondent herein should examine the witnesses in Special Civil Suit No.15 of 2002, where it is plaintiff and in Special Civil Suit No.91 of 2005 where it is impleaded as defendant. However, whatever may be the mode and manner decided by respondent plaintiff and the Court but that should not compel petitioner to examine any witnesses or lead evidence in a suit to which it is not a party. The choice would be entirely that of the petitioner herein and if it still wishes to abide by or agree to a common evidence or common examination, then, it would be

open for parties to move joint purshis in that behalf.

16. While passing this order I have noted the contention of Mr.Kulkarni that during the pendency of this petition, the order under challenge is acted upon and M/s.Madan Sales Corporation who is plaintiff in Suit No.91 of 2005 have already entered the witness box and its cross examination is also over. In my view, this submission overlooks the fact that whatever may be the arrangement between M/s.Madan Sales Corporation and respondent herein, the present petitioner being party defendant in only one suit cannot be held to be bound by the order of examination of witnesses determined by the trial court unless it has agreed to do so. Petition allowed.

. Ad-interim stay granted by this Court to continue for a period of four weeks from today.

(S.C.DHARMADHIKARI, J)